No 87-1390

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MAKAH TRIBE, et al.,

Petitioners,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

KENNETH O. EIKENBERRY
Attorney General

DAVID E. WALSH
Deputy Attorney General

TIMOTHY R. MALONE
Assistant Attorney General
(Counsel of Record)

Attorneys for Respondents
State of Washington, et al.

Office of the Attorney General
7th Floor
Highways-Licenses Building
Olympia, Washington 98504
Telephone: (206) 753-6245

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

63 pp

QUESTION PRESENTED

Are attorneys' fees available under 42 U.S.C. § 1988 in litigation between an Indian Tribe and a State when the purposes and effects of the litigation were:

(1) To determine the nature and extent of a tribal right, established by federal treaty, to a natural resource;

(2) To establish an allocation of the natural resource between the competing claims of Tribes and non-Indian users;

(3) To determine the extent of the limitations on State regulatory power over the natural resource necessary to accommodate the treaty right.

TABLE OF CONTENTS

		Page
QUESTION PRESENTED		i
STATEMENT		3
A.	The Attorneys' Fee Request	4
B.	The Underlying Proceeding	6
REASONS WHY THE PETITION SHOULD BE DENIED		9
A.	Introduction And Summary	9
B.	The Ninth Circuit Opinion Did Not Create Any New Exception To The Reach Of 42 U.S.C. § 1983	12
C.	The Court of Appeals Did Not Establish A "De Facto" Good Faith Immunity For Government Officials Regarding Awards Of Attorneys' Fees	17
D.	The Holding Of The Lower Court That The Tribes' Fourteenth Amendment Claims Provide No Basis For An Attorneys' Fee Award Is Correct	18
CONCLUSION		20

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
Arizona v. California, 373 U.S. 546 (1963)	9, 10, 13
Board of Education v. Pico, 457 U.S. 853 (1982)	14, 15
Boatowners and Tenants Assn. v. Port of Seattle, 716 F.2d 669 (9th Cir. 1983)	16
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979)	11
Consolidated Freightways v. Kassel, 730 F.2d 1139 (8th Cir. 1984) *cert. den.*, 469 U.S. 834 (1984)	11, 17
Douglas v. Seacoast Products, 431 U.S. 265 (1977)	10, 11, 16
Hagans v. Lavine, 415 U.S. 528 (1974)	12, 19, 20
Maher v. Gagne, 448 U.S. 122 (1980)	12, 19, 20
Maine v. Thiboutot, 448 U.S. 1 (1980)	11, 13, 15
Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1 (1981)	15
Montana v. United States, 450 U.S. 544 (1981)	10, 16

	Page
Oneida Indian Nation v. Oneida County, 414 U.S. 661 (1974)	16
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)	15
Roe v. Wade, 410 U.S. 113 (1973)	13
State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979)	passim
Tennessee v. Garner, 471 U.S. 1 (1985)	14
United States v. Washington	passim
White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1987) *cert. den.*, ____ U.S. ____ , 105 S.Ct. 940	11, 14, 17
Winters v. United States, 207 U.S. 564 (1908)	9
Wright v. Roanoke Redevelopment and Housing Authority, ____ U.S. ____ , 93 L. Ed. 2d 781 (1987)	15
Youngberg v. Romeo, 457 U.S. 307 (1982)	14, 15

FEDERAL STATUTES

	Page
28 U.S.C. § 1331	12
28 U.S.C. § 1343	20
28 U.S.C. § 1343(3)	7
28 U.S.C. § 1345	5, 7, 9, 20
28 U.S.C. § 1362	7, 12, 20
42 U.S.C. § 1983	passim
42 U.S.C. § 1988	4, 5, 12

UNITED STATES CONSTITUTION

U.S. Constitution Fourteenth Amendment	passim

No. 87-1390

IN THE SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1987

MACKAH TRIBE, et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, State of Washington, et al., respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Court of Appeals for the Ninth Circuit entered in this case on March 31, 1987.

STATEMENT

The principal question raised by the Petition for Certiorari is whether a Tribe may recover attorneys' fees, under 42 U.S.C. § 1988 in a lawsuit between sovereign or quasi-sovereign entities which sought interpretation of treaties and an allocation of a natural resource, with consequent preemption of state regulatory authority to

determine that allocation. The court below, relying on this Court's opinion in *State of Washington v. Washington State Commercial Passenger Vessel Association*, 443 U.S. 658 (1979) determined that the purpose of the proceedings in *United States v. Washington*[1] was to determine the character, nature, and extent of the tribal treaty right to take fish. The court below concluded that this treaty interpretation proceeding did not qualify as a "claim arising under 42 U.S.C. § 1983" and, accordingly, did not support an award of attorneys' fees under 42 U.S.C. § 1988. Pet. App. A 10. The Court further determined that there were no substantial, Fourteenth Amendment-based due process or equal protection claims in the proceedings sufficient to provide an independent basis for an award of attorney fees. Pet. App. A 10-12.

Petitioners challenge both the court's characterization of the underlying case and the conclusion in this particular proceeding that 42 U.S.C. § 1988 is not applicable.

Petitioners' statement of facts is both argumentative and incomplete. Petitioners focus almost exclusively on a limited number of conclusions of the district court from the initial trial, attempting to recharacterize the entire case with the § 1983 label, a label that was virtually absent from the case until the renewed motion for attorneys' fees in 1980. The following statement is submitted, therefore, to put the attorneys' fee proceeding the correct chronological perspective, and to provide additional information regarding the underlying proceeding itself.

A. **The Attorneys' Fee Request.**

This attorneys' fee proceeding was initiated on October 30, 1980, with the filing of a "renewed motion" for attorneys' fees. The request for attorneys' fees was based

---

[1]We shall refer to the entirety of the proceedings, which began in 1970 with the filing of a complaint in district court, and which culminated in *Passenger Vessel*, by the name of the original filing, *United States v. Washington*.

exclusively on 42 U.S.C. § 1988 which had been enacted over four years earlier on October 19, 1976. This renewed motion was the first time that 42 U.S.C. § 1988 had been mentioned in the case. It was also the first time that 42 U.S.C. § 1983 had been mentioned in the case, save for a very limited reference in only two of the numerous complaints filed by plaintiff-intervenor Tribes in 1971.[2]

The Petitioners requested attorneys' fees for virtually all time spent in *United States v. Washington*, from the date of the filing of the initial complaint by plaintiff, United States, on September 18, 1970, through the date of the filing of the renewed motion in October 1980. The request included all time spent in the preparation and trial before the district court, culminating in the memorandum opinion at 384 F. Supp. 312 (W.D. WA 1974) along with the appeal to the Ninth Circuit, 520 F.2d 676 (June 4, 1975), and the initial Petition for Certiorari to this Court. *See* 423 U.S. 1086, *rehearing denied* 424 U.S. 978 (1976). Although these proceedings were concluded prior to the enactment of § 1988 in 1976, the Tribes sought attorneys' fees for them on the basis that other proceedings in *United States v. Washhington* were pending at the time of the enactment of § 1988.

The fee request included virtually all time spend in a second major segment of the case, which consisted of a series of separate proceedings to resolve disputes involving the application of the treaty allocation right, as determined in the first segment just described and to establish the detailed conditions and limits on state enforcement power over the actual management of the resource. This became very complicated because of the complexity of

---

[2]The principal jurisdictional statute in the complaint filed by plaintiff, United States, was 28 U.S.C. § 1345; CR 1, App. A 1; for Tribal Intervenors the principal statute was 28 U.S.C. § 1362. The only two complaints referring to 42 U.S.C. § 1983 were the complaints in intervention filed by two of the smallest Tribes, i.e., by the Hoh Tribe (7-23-71) CR 77 (App. A16) and the Upper Skagit Tribe, (10-26-71) CR 147. (App. A24)

technical fisheries management questions and the impact on the various fishing industries that had developed over the years.[3] This segment also included proceedings leading up to and including this Court's opinion in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (hereafter referred to as *Passenger Vessel*).

On May 8, 1981, Judge Walter Craig ruled that the Tribes alleged and ultimately prevailed upon the cause of action under 42 U.S.C. § 1983, and determined that a fee award under § 1988 was appropriate. 627 F. Supp. 1426 (W.D. WA 1981). Judge Craig determined, however, that attorneys' fees should not be awarded in proceedings which had arisen between the date of the mandate from this Court and the filing of the renewed motion for fees. The court concluded that neither party prevailed in proceedings during that period. 627 F. Supp. 1427.[4] Thus the court granted attorneys' fees only for periods preceding this Court's decision in *Passenger Vessel*. The quantification of the fee award was referred to Special Master. The district court's order awarding attorneys' fees was entered on April 30, 1985, and the Ninth Circuit reversed on an opinion filed March 31, 1987, 813 F.2d 1020 (9th Cir. 1987).

B. **The Underlying Proceeding.**

We would make three points about the underlying proceedings.

---

[3] Issues considered included questions of conservation closures for treaty fishermen, seasonal limitations for Indians and non-Indian fishermen, resolution of inter-tribal disputes, enforcement actions against Indian and non-Indian fishermen, the determination of treaty status for some groups of Indians which were non-federally recognized, the validity of restrictions upon resale of boats which had been purchased from licensed fishermen pursuant to a state buy-back program, and a myriad of separate other proceedings. These separate proceedings, occurring from 1974 through 1979, (and thus overlapping somewhat the first segment) involved various groupings and alignments of parties. At times Tribes opposed each other; at other times they jointly opposed the United States or the State.

[4] *See* Petition for Certiorari App. B. Judge Craig also rejected the applicability of any "bad faith" rationale for an award of attorney fees.

First, federal court jurisdiction was never an issue. The principal parties were limited to sovereign and quasi-sovereign entities,[5] and jurisdiction was premised on 28 U.S.C. § 1345 (for the United States) and § 1362 (for the Tribes). Because these jurisdictional statutes were squarely applicable to the type of proceeding sought to be initiated, the State did not contest jurisdiction.[6] Since the district court clearly had jurisdiction over both the parties and the subject matter, it was not necessary at that time to determine whether the court also had jurisdiction under 28 U.S.C. § 1343(3), which was referred to in only three of the tribal complaints.

Second, the goal of the litigation was to obtain a construction of the treaty fishing clause, an allocation of the resource in accordance with that construction, and the preemption of the state's regulatory authority over the resource in order to implement the allocation.[7] The basic problem confronting the parties and the courts throughout these proceedings is that the treaty language affords little, if any, guidance as to how the specific allocation should be made, and precisely how far and in what respects the state regulatory authority should be preempt-

---

[5]Tribal intervenors in fact actively resisted the intervention by individual tribal fishermen, emphasizing that this was a case dealing with sovereign entities exclusively. A tribal response to a Motion for Intervention dated April 15, 1976, (CR 2033) stated:

> To allow this group [a group of individual tribal fishermen] to intervene, the Court would be opening the door for any group, allotment holder, minority faction of a tribe to seek redress in this court. *The character and limitations of this case as being between governments will be lost. This Court has allowed all tribes claiming treaty rights to intervene. But never have individuals been allowed or non-tribal entities been allowed to formally participate.* (Emphasis supplied.)

[6]Petitioner attempts to twist our failure to contest jurisdiction into a state concession that the district court had jurisdiction under § 1343(3). The argument is without merit. There was no need to take on that issue at that time, and it has become important solely in the context of an attempt to recharacterize the case as a § 1983 action.

ed. The root of this problem was identified by the court in *Passenger Vessel*:

> In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce* * * *

Unfortunately, that resource has now become scarce, and the meaning of the Indians' treaty right to take fish has accordingly become critical.

443 U.S. at 669.

Four different interpretations were advanced by the parties.[8] The United States, the original plaintiff, ultimately sought a 50/50 allocation of the anadromous fishery resource between the State and the Tribes. The Tribes, however, sought an almost exclusive allocation of fishery along with a complete preemption of state regulation. The State Departments of Fisheries and Game each offered a still different interpretation. A major task of the courts was to select one of the four.[9]

Third, after the case was filed, 42 U.S.C. § 1983 did not play any direct or even indirect part in the proceedings, until the renewed motion for attorneys' fees filed in 1980 . There is no mention of § 1983 in any of the court opinions or in documents filed by any of the parties, other than the two complaints previously noted. (A third com-

---

[7] *See* complaint filed by plaintiff, United States, prayer for relief 1 (b)(iii) regarding an allocation of resource App. A10, 11 and 2 through 5 relating to preemption of state authority. CR 1. *See also* prayer for relief in tribal intervenor complaints which mirror plaintiff United States' position. App. A12-27; Yakima Tribe CR 75, App. A12-14; Hoh Tribe CR 77, App A17-18; Quileute Tribe CR 82, App. A20-23; (Complaints filed by Quinnault Tribe CR 85, Makah Tribe CR 84, Lummi Tribe CR 83, similar to Quileute Tribal Complaint); Upper Skagit CR 147, App. A25-27; (Complaints filed by Muckleshoot Tribe CR 81A and Puyallup Tribe CR 568 similar).

[8] *Passenger Vessel*, 443 U.S. at 670-671.

plaint did mention § 1343(3) alone.) There is no reference at all to § 1983 in the exhaustive 254-page brief filed in this Court by the present petitioners in *Passenger Vessel*. Instead, the rights referred to were characterized as property-type rights, with analogies to reserved water rights found in *Arizona v. California*, 373 U.S. 546 (1963) and *Winters v. United States*, 207 U.S. 564 (1908). At one point in petitioners' brief before this Court in *Passenger Vessel*, the case was referred to as an *in rem* proceeding.[10] Similarly when discussing the issue of limitations on state regulatory power, no reference to the Fourteenth Amendment ever appeared; for the issue was always characterized in terms of preemption of state authority. In short, the nature of the case, positions of the parties, and issues addressed were dramatically different from a typical civil rights action and from the characteriation the petitioners would now give these proceedings.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Introduction and Summary.

The petitioners would have this Court believe that the decision below represents a major departure from the

---

[9]The Department of Fisheries proposed a fair share of the resource measured at 30 percent, and the Department of Game argued an access right only rather than an allocation right. This Court's summarization of tribal position was consistent with their brief in *Passenger Vessel*, p. 56, CR 7973:

> The District Court saw its task to be to devise a remedy which would accommodate the rights of the parties within the limitation of conservation requirements. The Department of Game urged that no harvest allocation be made. The Department of Fisheries, as previously mentioned, asked that the tribes be allocated a fixed percentage of the harvest. The tribes, on the other hand, argued that the treaties were intended to preserve the Indian livelihood in an amount sufficient to satisfy their needs, an analogy to reserved water rights in *Arizona v. California*, 373 U.S. 546 (1963).

[10]*See* excerpts from brief CR 7973 p. 199 (App. B9).

settled law regarding the scope of 42 U.S.C. § 1983 and the availability of attorneys' fees under 42 U.S.C. § 1988. It is the position urged by the petitioners, however, which would constitute such a departure; for the decision of the court below is consistent with the decisions of this Court and the other courts of appeal.

The major error in the position of the petitioners is that they completely overlook—and would have this Court overlook—the principal purpose and effect of the underlying litigation, which culminated in this Court's decision in *Passenger Vessel*, 443 U.S. 658 (1979). That litigation, which was commenced by the United States on behalf of the petitioners, and not by the petitioners themselves, was brought in order to determine the nature and extent of a tribal right, established by a federal treaty, to a natural resource, to determine an allocation of that resource between the competing claims of the Tribes and non-Indian users, and to establish the extent to which state regulatory power, as embodied in specific statutes and administrative regulations, should be preempted in order to accommodate the treaty right and the judicially established allocations.

If the position of the petitioners is correct, every controversy between a Tribe and a State over the question of whether a treaty impliedly grants rights to a natural resource would automatically become a § 1983 case. This would be true whether the natural resource involved is land under navigable waters, as in *Montana v. United States*, 450 U.S. 544 (1981), or water itself, as in *Winters v. United States*, 207 U.S. 564 (1908) and *Arizona v. California*, 373 U.S. 546 (1963), or a fishery resource, as in this case.

Further, when a fishery resource is involved, the controversy is essentially not over ownership of that resource, as it would be in the base of a riverbed or tidelands, but rather becomes a controversy over the scope of regulatory power. *See Douglas v. Seacoast Products*, 431 U.S. 265, 284 (1977), which rejected the concept of prop-

erty ownership by anyone in a fishery resource, and identified the governmental interest in such a resource as regulatory only. Viewed in the light of *Douglas*, the controversy involved here sifts down to one over jurisdiction, and the central question becomes the extent to which an otherwise unobjectionable state regulatory power becomes preempted under the Supremacy Clause by reason of a conflicting federal right. *See Consolidated Freightways v. Kassel*, 730 F.2d 1139 (8th Cir. 1984) *cert. denied.* 469 U.S. 834 (1984) and *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1987), *cert. denied.* ____ U.S. ____ 105 S.Ct. 940 (1987), holding that such controversies do not fall within § 1983 and thus do not give rise to an attorneys' fee award. That is, this controversy involves not just an allocation of the fisheries resource, but also the allocation of power among sovereigns or quasi-sovereigns to determine that allocation of the resource.

Like the federal rights involved in *Consolidated Freightways* and *White Mountain Apache*, the federal right involved here is not found in any language addressed to the states. The treaty provision does not in any way purport to limit state power over individuals, as do, for example, the provisions of the Fourteenth Amendment, which are involved in the typical § 1983 case; nor does the treaty provision purport to place upon the State any positive obligation to individuals, as did, for example, the federal statutory provisions involved in *Maine v. Thiboutot*, 448 U.S. 1 (1980).

As pointed out by the court in *Consolidated Freightways*:

> Section 1983 was enacted for the purpose of "ensuring a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto."

Consolidated Freightways 730 F.2d at 1146 [quoting from *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, at 615 (1979)]

To be sure, *Thiboutot* extended the scope of § 1983 beyond that suggested by this quotation to include other

federal statutory commands to a state, *e.g.*, commmands to afford certain benefits under the Social Security Act. But no similar command is involved here.

The petitioners are thus attempting to extend the parameters of §§ 1983 and 1988 well beyond those established by this Court and the lower courts. Nor does their reliance upon their supposed constitutional claims bring them within those parameters. Unlike the constitutional claims involved in *Maher v. Gagne*, 448 U.S. 122 (1980) and *Hagans v. Lavine*, 415 U.S. 528 (1974), the constitutional claim involved here is completely dependent upon the existence and extent to the treaty right. In the absence of the treaty right, the constitutional claim simply disappears. And reliance upon the constitutional claim to garner attorneys' fees is just so much bootstrapping.

The major issue involved here, *i.e.*., the applicability of § 1983, would take on much greater importance and might well, we agree, merit review by this Court, if the ability of Tribes to have a federal court hear their treaty-based claims at all were involved. But various other statutes, such as 28 U.S.C. §§ 1331 and 1362, keep the doors open for such tribal claims. And the belated efforts of the Tribes to recharacterize this case and thus win attorneys' fees do not merit review. The decision below ties up a last loose end in a proceeding that has gone on for almost 18 years. There is no good reason to untie it.

B. **The Ninth Circuit Opinion Did Not Create Any New Exception To The Reach of 42 U.S.C. § 1983.**

Petitioners' principal argument is that the opinion below substantially narrows the scope of § 1983 by creating a major new exception to the types of rights that are enforceable under that statute. Petitioners read the opinion as creating a new "known and well-delineated" test for both Fourteenth Amendment rights and federal statutory rights. Petitioners also read the opinion as shutting the door to virtually any enforcement of treaty rights under §

1983. Neither reading is correct, for both are entirely too broad.[11]

What the decision below does hold, however, and what the petitioners fail to recognize, is that § 1983 does not apply to litigation of the unique character involved here. Indeed, the Tribes' original characterization of this litigation, as being akin to the water rights dispute involved in *Arizona v. California*, 373 U.S. 546 (1963) is much nearer the mark. *See* p. 9, *supra*, note 9 (quoting from Tribes' brief in *Passenger Vessel*). Just as in *Arizona v. California*, we here have litigation over a natural resource, to determine how that resource should be allocated between sovereign or quasi-sovereign entities. And as in *Arizona* we have here the issue of the extent to which state authority over that resource may have been preempted by federal law, as well as the issue of the extent to which a treaty or executive order might allocate part of the resource to an Indian Tribe.

All of these factors, common to both this litigation and that in *Arizona*, make this litigation fundamentally different in character from the types of claims that fall within § 1983.

Thus, the decision below was limited in application and scope to the unique nature of the underlying case. The petitioners however state:

---

[11]To illustrate our point: before this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) there was no "known and well-delineated" right under the Fourteenth Amendment to have an abortion; yet the constitutional claim successfully asserted in *Roe* was, we would agree, within the scope of § 1983 and § 1988 would be applicable. The petitioners, however, would read the decision below as holding otherwise. To take another example, assume that provision of the Social Security Act imposed upon the states in obligation to make payments in some amount to eligible recipients, but the criteria for determining precisely the amounts of the payments and the qualifications for eligibility were murky, and required judicial clarification. Litigation by an individual recipient brought to determine those amounts and those qualifications would, after *Thiboutot*, fall within the scope of § 1983. And contrary to the position of the petitioners, the decision below does not suggest otherwise.

> The opinion of the Court of Appeals contains no suggestion that its "known and well-delineated" exception does not apply to statutory and constitutional rights* * * *

Pet. 44.

To be sure, there is no explicit statement in the opinion to that effect. But the reason for this is obvious. The court felt none was necessary, as a careful reading of the opinion will show.

The opinion was not structured or intended to be applicable to mainstream § 1983 cases dealing with Fourteenth Amendment-based or specific federal statutorily created rights.[12] Further the text of the opinion itself was not phrased in a manner that would suggest the broad impact claimed. The court carefully described the nature of the proceeding in the background portion of the opinion in order to preclude the type of expansive reading claimed by petitioners.

Nor has the opinion been read or applied by anyone as creating the type of broad impact now suggested by petitioners. Essentially the same argument as made now was made in the petition for rehearing, with the suggestion for rehearing *en banc*, in the court below. In obvious rejection of that argument, not a single judge voted for rehearing. Furthermore, the opinion which was issued almost a year ago, has not been cited even once for the broad holding urged by petitioners.

The correctness of the decision below is actually reinforced, rather than put into question, by a comparison between the underlying case here and decisions relied on by the petitioners.

Board of Education v. Pico, 457 U.S. 853 (1982), *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Tennes-*

---

[12]The opinion does not exclude all tribal treaty rights from being enforceable under § 1983. It specifically states that treaty rights could be enforceable in certain situations under § 1983, citing *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 850 (9th Cir. 1987) *cert denied* ___ U.S., ___, 105 S.Ct. 940 (1987).

see v. Garner, 471 U.S. 1 (1985), for example, all dealt with individual rights guaranteed under the Fourteenth Amendment. That Amendment, however uncertain its contours might be, is expressly directed to the relationship between the State and its citizens and other persons within its boundaries: "No State shall * * *; nor shall any State * * * *" Each of these Fourteenth Amendment cases thus involved a direct and fundamental relationship between the plaintiff individual and the governmental entity. This fundamental relationship established a specific duty of the governmental entity towards the individual, and the scope of the rights involved in the extent of that duty were determined in the context of a specific transaction between the individual and government entity.[13] In contrast, the treaty language, including the fishing clause, is not addressed to the State at all. As would be expected in a treaty between sovereigns, it is cast in terms of rights and duties vis-a-vis each other.

Similarly, the cases recognizing the enforceability of certain federal statutes under § 1983 involved fact situations and issues substantially different from those involved here. Cases such as *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Wright v. Roanoke Redevelopment and Housing Authority*, ___ U.S., ___ 93 L. Ed. 2d 781 (1987); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981); *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981) involved statutes expressly directed to the states and mandating—

---

[13] *Board of Education v. Pico, supra* involved the relationship between the individual student and the school board management of the school system. *Youngberg v. Romeo, supra* involved the relationship between an involuntary committed mentally retarded person and the institution at which he was housed. *Tennessee v. Garner, supra* involved the relationship between a suspected felon and a police agency using force to apprehend.

or at least claimed to be mandating—the states to confer some benefit upon individuals.[14]

In the present case, the treaty language in question did not purport to require State conferral of benefits, and did not contain any articulation of state duties and responsibilities.

This is not to suggest that § 1983 has no role at all to play with respect to treaty provisions or Indian Tribes. Rather, it is to suggest that, as recognized by the court below, it has no role to play in what is essentially a type of quiet title action between sovereigns or quasi-sovereigns. *cf. Montana v. United States*, 450 *U.S.* 544 (1981) and *Oneida Indian Nation v. Oneida County*, 414 U.S. 661 (1974).

Analogies between *United States v. Washington* and litigation over property rights can, however, be misleading, despite our own use of those analogies. *Douglas v. Seacoast Products*, 431 U.S. 265 (1977) cautions us that when a fishery or other wildlife resource is involved, the critical question is jurisdiction, not ownership. As stated in *Douglas*:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. Ibid.; Geer v. Connecticut, 161 US 519, 539-540, * * * * (1896) (Field, J., dissenting). The "ownership" language of cases such as those cited by appellant must be understood as no

---

[14]In order to be enforceable under § 1983 the federal right has to be an individual right, *i.e.*, there must have been a congressional intent to create a private cause of action in the federal statute. The statute must identify or refer to a guidelines or standards. Compare *Boatowners and Tenants Assn. v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983). Note that petitioners characterized the rights in this case as public rather than private rights in their brief in *Passenger Vessel*, CR 7973 p. 196 Appendix B8.

> more than a 19th-century legal fiction expressing "the importance to its people *that a State have power to preserve and regulate the exploitation of an important resource.*" Tommer v. Witsell, 334 US, at 402. (Emphasis supplied.)

431 U.S. at 284.

Thus, when a fishery resource is involved, what might first appear to be ownership issues are in reality jurisdictional issues. And the central question in this entire controversy thus takes on its proper form. That question is essentially a preemption question, undistinguishable from the question presented in *Consolidated Freightways v. Kassel*, 730 F.2d 1139 (8th Cir. 1984) *cert. denied* 469 U.S. 834 (1984) and *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1987), *cert. denied* ____ U.S. ____ 105 S.Ct. 940 (1987).

For the same reason that § 1983 was held inapplicable in those cases, it is inapplicable here as well.

C. The Court of Appeals Did Not Establish a "De Facto" Good Faith Immunity For Government Officials Regarding Awards of Attorneys Fees.

The petitioners' argument that the court below established a *de facto* good faith immunity for declaratory judgment and injunction actions is nothing more than their previous argument in a new guise, and rests upon the same basic misconception as to the scope of the court's holding. That holding, as we have seen, is limited by the unique nature of the underlying litigation, and has no applicability outside its boundaries. Thus, it does not apply to cases which are based upon a constitutional or statutory command to the states and which are, for that reason, properly within the scope of § 1983.

Further, to the extent this argument is a thinly disguised attempt to raise bad faith or obdurate behavior as alternative grounds for an award, it should be rejected outright.[15] Those grounds were rejected by the district court in both the initial fee request and in the present proceeding. *See* Pet. App. B 4 (Par. 5). Furthermore, the

district court refused to award any attorneys' fees at all for proceedings after the mandate of this Court in *Passenger Vessel*, on the basis that no party could be determined to have prevailed. *See* Pet. App. B 5 (Par. 7).

D. **The Holding Of The Lower Court That The Tribes' Fourteenth Amendment Claims Provide No Basis For An Attorneys' Fee Award Is Correct.**

Again the Tribes completely overlook or misread the basis for the holding of the court below; and they fail to address at all the lower court's rationale for rejecting their Fourteenth Amendment claim. That rationale was simply this: the Fourteenth Amendment claims were completely dependent upon the treaty-based claim. Absent a valid treaty-based claim, the Fourteenth Amendment claim simply disappears. As stated by the court:

---

[11]This is not to deny that the underlying proceeding was hard fought. For the state agencies involved in this litigation were in the unenviable position of being a stakeholder. The state agencies had the responsibility to conserve and manage the fishery resource, but were involved in the middle of disputes between tribal fishermen and non-Indian fishing interests, as well as federal courts and state courts. The non-Indian fishing industry, which was threatened with severe economic dislocation as a result of the district court allocations order, was vocal and vigorous in its opposition to the federal court determinations. And on the other side were individual tribal members who were aggressively testing the limits of the treaty rights claimed by them, not only in court but in actions on the water which violated then current state statutes and regulations, thus promptly leading to conflict with law enforcement authorities. In addition to the competition between those parties interested in access to the resource, the state agencies were also caught up in the middle of a dispute between the state and federal court systems. The principal reason for the State's attempt to seek a definitive interpretation of the treaty right by this Court was to establish once and for all, for all parties and for all court systems, the full nature and extent of their respective allocation rights in the fishery resource. The State's strategy was based on the assumption that once this Court had spoken, the battles would die down and calm would be restored. That assumption, fortunately for everyone, has turned out to be correct.

> The district court did find * * * that the present state regulations did discriminate against the Indians, but only in the sense that the state failed to recognize the special entitlement the Indians were to be given. The district court did not hold that the state discriminated for the sake of discrimination—the discrimination was due to the failure to recognize the Indians' special status. *Both* sides appealed to the Ninth Circuit. In our opinion, the Ninth Circuit characterized the relationship between Indians and non-Indians as a cotenancy, discussed the state regulations which it noted appeared sound and commendable, and stated that in treating treaty Indians no differently than other citizens, the state rendered the treaty guarantees nugatory. *United States v. Washington*, 520 F.2d at 685-86. Nowhere did the court hold that the state had violated any Fourteenth Amendment rights. * * * When the Supreme Court wrote its opinion, equal protection was never mentioned. It appears then that the Indians abandoned their equal protection arguments after the initial complaints and initial district court decision. *See White Mountain*, 798 F.2d at 1215.

Pet. App. B 11.

The Tribes, in short, have never convinced any court that they have a valid Fourteenth Amendment claim which is independent of the treaty claim. Nor have they even tried. In neither their complaints nor in any of their briefs, including their brief before this court in *Passenger Vessel*, did they assert any such independent claim, so far as we can tell. Their petition certainly does not tell us where they might have done so.

In *Maher v. Gagne*, 448 U.S. 122 (1980) and *Hagans v. Lavine*, 415 U.S. 528 (1974), there was no such bootstrapping as petitioners are attempting here. That is, the constitutional claims and non-constitutional claims were separate and independent. The court below was thus correct in rejecting the petitioners' effort to find a constitutional basis for the attorneys' fee award. And that rejection is completely consistent with *Maher* and *Hagans*.

There is also no merit in petitioners' suggestions that the State conceded jurisdiction under § 1343. The State did not contest jurisdiction because it was solidly based on §§ 1345 and 1362.

The court below, in short, was correct in observing that the claimed Fourteenth Amendment claims have been "dusted off" and amplified solely for the purpose of obtaining fees in an action where Fourteenth Amendment rights of any kind are at best an afterthought.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

DAVID E. WALSH
Deputy Attorney General

TIMOTHY R. MALONE
Assistant Attorney General

(Counsel of Record)

Attorneys for Respondents
State of Washington, et al.

APPENDIX A

Complaint of United States and Excerpts from various Tribal Complaints in Intervention.

APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

NO. 9213

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

The United States of America, by Stan Pitkin, United States Attorney for the Western District of Washington, acting under authority of The Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

FIRST CLAIM FOR RELIEF

1. This Court has jurisdiction by reason of the fact that the United States is plaintiff. 28 U.S.C. § 1345.

2. The United States brings this action on its own behalf and on behalf of the Puyallup Tribe of the Puyallup Reservation, the Nisqually Indian Community of the Nisqually Reservation, the Muckleshoot Indian Tribe of the Muckleshoot Reservation, the Skokomish Indian Tribe of the Skokomish Reservation, the Makah Indian Tribe of the Makah Indian Reservation, the Quileute Tribe of the Quileute Reservation, and the Hoh Tribe or Band of Indians which are tribes or communities of Indians recognized as such by the Secretary of the Interior.

3. The United States has entered into treaties with the tribes named in paragraph 2 as follows:

The Treaty of Medicine Creek on December 26, 1854, with the Puyallup, Nisqually and other Tribes, 10 Stat. 1132.

The Treaty of Point Elliott on January 22, 1855, with various tribes and bands including the Indians who now comprise the Muckleshoot Indian Tribe, 12 Stat. 927.

The Treaty of Point No Point on January 26, 1855, with the Skokomish and other Tribes, 12 Stat. 933.

The Treaty with the Makahs on January 31, 1855, 12 Stat. 939.

The Treaty of Olympia on July 1, 1855 and Juanuary 25, 1856, with the different tribes and bands of the Qui-naielt and Quil-leh-ute Indians, including the Hoh Tribe or Band of Indians, 12 Stat. 971.

Each of said treaties contains a provision securing to the Indians certain off-reservation fishing rights. The following provision from the Treaty of Medicine Creek is typical of these treaty provisions:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * * *Provided, however*, that they shall not take shellfish from any beds staked or cultivated by citizens, * * *."

Each of the tribes named has usual and accustomed fishing places within the western portion of the State of Washington, including, among others, the Nisqually River, the Puyallup River and Commencement Bay, the White River, the Green River, the waters of Hood Canal and the rivers flowing into said Canal, the Straits of Juan de Fuca, the Quileute River and its tributaries, and the Hoh River. Each of the Tribes named has rights secured by said treaties to take fish, including the species commonly known as steelhead, at its usual and accustomed fishing places.

4. Subsequent to the execution of the treaties and in reliance thereon, the members of the tribes have contin-

ued to fish for subsistence and commercial purposes at the usual and accustomed places. Such fishing provided and still provides an important part of their subsistence and livelihood.

5. The rights of said tribes of taking fish at all usual and accustomed places guaranteed by said treaties are subject to regulation by the defendant only to the extent necessary for conservation. These rights do not derive from state authority and must be recognized and protected by the defendant. The defendant's authority to restrict the exercise of such rights is different from and more limited than its authority to restrict the state-conferred fishing privileges of persons who are not the beneficiaries of such rights. Proper recognition and protection of the rights require that before restricting their exercise the defendant must (a) deal with the matter of the Indians' treaty fishing rights as a subject separate and distinct from that of fishing by others, (b) so regulate the taking of fish that the tribes and their members will be accorded an opportunity to take, at their usual and accustomed places by reasonable means feasible to them, a fair and equitable share of all fish which the defendant permits to be taken from any given run, and (c) establish that it is necessary (as distinguished from merely convenient) for conservation to impose the specifically prescribed restriction on the exercise of the treaty right.

6. The defendant has failed and refused to recognize and protect the tribes' treaty rights. It has, with limited exceptions, failed and refused to deal with fishing by the beneficiaries of such rights as a separate subject when formulating regulations to govern the taking of fish in the waters subject to the defendant's jurisdiction. It has, with limited exceptions, denied that such rights invest the beneficiaries with any privileges and immunities greater than those which the defendant chooses to accord citizens generally. It has dealt with Indian treaty rights as though they were state-conferred privileges, any exercise of which the state is not only free to, but is required to, regulate to

the same extent and in the same manner as it regulates fishing by persons not entitled to exercise said rights. In conformity with this premise, defendant, with limited recent exceptions, contends it has no authority to, and has refused to, recognize or allow any manner of exercise of the right, or its exercise during any time, at any place, or for any purpose the defendant does not allow other persons to take fish. It has failed and refused to attempt to so regulate fishing in waters subject to its jurisdiction as to accord the beneficiaries of such right an opportunity to catch, at their usual and accustomed places and by reasonable means feasible to them, a fair and equitable portion of the fish which are available for catching from a particular run consistent with adequate escapement for spawning and reproduction. It has not determined what specific restrictions must necessarily be imposed upon the exercise of the treaty rights in the interest of conservation and informed the beneficiaries thereof in advance of the enforcement what those restrictions are.

It has so framed its statutes and regualtions as in many instances to allow all the harvestable fish from given runs to be taken by those with no treaty rights before such runs ever reach the usual and accustomed fishing places to which the treaties apply.

Defendant has by statute and regulation totally closed many of the usual and accustomed areas of said tribes to all forms of net fishing while permitting commercial net fishing elsewhere on the same runs of fish.

Defendant has by statute and regulation set aside one species of fish, the species commonly known as steelhead, for the exclusive use and benefit of a single category of persons, namely sportsmen, and has imposed limitations on the means by which, the purpose for which, and the numbers of which said species may be taken that are in derogation of the treaty rights of said tribes.

7. Defendant has not undertaken, or caused to be undertaken, any studies, research, or experimentation—or if it has, has not introduced the results thereof into any

hearing or public proceeding at which state fishing laws or regulations were considered or enacted—of the extent to which it is necessary for the defendant to restrict the exercisie of fishing rights secured to Indian tribes by treaties of the United States.

8. In devising, adopting and promulgating the regulations by which they authorize the taking of fish for commercial or sports purposes by persons subject to the state's jurisdiction, and in establishing and carrying out fishery management policies and programs and determining conservation objectives, the defendant and its officers and agents have not given recognition to, or made proper allowance for, the rights secured to Indian tribes by treaties of the United States.

9. The defendant and various of its officers and agents claiming to act in their official capacities on behalf of the defendant, have seized nets and other property of members of the aforementioned tribes and have harassed, intimidated, and threatened said members or caused them to be arrested and prosecuted, for allegedly violating state laws or regulations pertaining to fishing for, taking of, or possession of, fish which were taken or sought to be taken by said members in the lawful exercise of rights secured by the treaties, and have confiscated or released fish belonging to said members and taken in the exercise of said rights, have interfered with obstructed, and attempted to prevent the transportaiton or sale of such fish so taken by members of said tribes and have otherwise harassed and interfered with said members in the exercise of said rights. Defendant, its officers and agents, assert their intention to continue these actions. In so acting and threatening to act, the defendant, its officers and agents are acting wrongfully and in derogation of rights secured by the treaties.

10. As a result of the said wrongful acts of defendant, the tribes and their members are being unlawfully deprived of their treaty right, privilege, and immunity to fish at many of their usual and accustomed places and have

suffered, and will continue to suffer, irreparable damage. The plaintiff, the tribes and members of the tribes, have no adquate remedy at law because

(a) the damages which have been and will be sustained are not susceptible of monetary determination;

(b) the right of the Indians to fish at their usual and accustomed places conferred by treaty with the United States is unique and should be specifically protected; and

(c) in the case of criminal prosecutions threatened by the defendant or its officers or agents purporting to act under the authority of the state statutes, these Indians have no remedy at all except at the risk of suffering fines, imprisonment and confiscation of property, involving a multiplicity of legal proceedings.

11. An actual controversy exists between the plaintiff on the one hand and the defendant on the other as to the nature and extent of the treaty fishing rights of the tribes named in this complaint and the attempted regulation thereof by the defendant.

SECOND CLAIM FOR RELIEF

12. Plaintiff restates and re-alleges the allegations of paragraphs 1 through 11 of this complaint.

13. Statutes of the defendant enacted without regard to Indian treaty rights make it unlawful to use various types of appliances including a set net, a weir, or any fixed appliance within any waters of the state for the purpose of catching salmon (RCW 75.12.060) or to lay or use any net for the purpose of taking fish which the defendant has classified as game fish, or lay or use any net capable of taking game fish except as permitted by regulation of the Department of Fisheries (RCW 77.16.060). Defendant's statutes also make it unlawful to spear, gaff or snag salmon except as may be authorized by the Director of Fisheries (RCW 75.12.070), to use reef nets except in limited areas specified by statute (RCW 75.12.160). Other statutes, including RCW 75.080.080, give the defendant's

Director of Fisheries broad authority to regulate the taking of salmon, and give defendant's Game Commission broad authority to regulate the taking of steelhead and other "game fish" (RCW 77.12.040), which authorities have been exercised without proper regard for Indian treaty rights, make violation of provisions of defendant's fisheries or game codes or regulations punishable as a crime (RCW 75.08.260, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, and provide for seizure and forfeiture of gear used or held with intent to use unlawfully (RCW 77.12.100)). Nets and other items used or "had or maintained for the purpose of" taking game fish contrary to law or Game Commission rule or regulation are subject to summary seizure and destruction by game protectors "without warrant or process." (RCW 77.12.130). Among other restrictions, regulations of the defendant issued by said Director of Fisheries make it unlawful to fish for or possess food fish from any waters over which the State of Washington has jurisidiction except as provided for in state statutes or in regulations of the State Department of Fisheries (WAC 220-20-010(1) and (2)). These regulations also make it unlawful to have an unattended gill net in the commercial salamon fishery (WAC 220-20-010(5)), or to place commercial food fish gear in any waters closed to commercial fishing (WAC 220-20-010(6)), or to attempt to take food fish by various specified means including gaffing, snagging, dip netting, spearing, and other, or to possess food fish so taken (with limited exceptions in connection with personal use angling) (WAC 220-20-010(11)), or to fish for or possess food fish taken contrary to provisions of any special season or emergency closed period prescribed in Chapter 220-28 of the Washington Administrative Code (WAC 220-20-010(16)), or to take salmon "for commercial purposes" i.e., by means other than angling—within three miles of any river or stream flowing into Puget Sound (WAC 220-20-015(2)), or within areas specified in WAC 220-47-020, or to fish for food fish for personal use by any means other than angling unless

otherwise provided or possess fish so taken (WAC 220-56-020(2)). Various officers and agents of the defendant have stated their intention on behalf of the defendant to apply such laws and regulations to all Indians fishing at their Tribe's usual and accustomed places in the exercise of rights secured by their treaties and have arrested, cited for prosecution, and seized gear of members of such Tribes for so fishing in violation of such laws and regulations.

14. Defendant's Director of Fisheries has promulgated regulations which give limited recognition to the treaty fishing rights of some of the Tribes named in paragraph 2 hereof. (Director of Fisheries Orders No. 866, 875, 885). Said regulations contain limitations and restrictions on the exercise of treaty rights that are not reasonable and necessary for conservation and are not the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes. Defendant's Director of Fisheries has failed and refused to promulgate regulations to provide recognition to, or permit exercise of, the treaty fishing rights of some Indian Tribes having treaty fishing rights, including the Muckleshoot Indian Tribe and the Skokomish Indian Tribe.

15. The effective RCW 75.12.060 and 77.16.060 and the regulations referred to in paragraph 13 is to close permanently to the taking of food fish by any means other than angling, a substantial porition of the area which contains numerous and important usual and accustomed fishing places of Tribes, while permitting commercial fishing in other areas on migratory fish runs which pass by such tribal fishing places. The defendant, its officers and agents, have failed to recognize and to provide sufficiently for the exercise of the treaty fishing rights of the Tribes, and their members, at their usual and accustomed places which failure constitutes a denial of the treaty fishing rights and an unlawful and unreasonable discrimination in favor of those fishing commercially or for recreation and pleasure and against the Tribes and their members. Such

action has not been and cannot be justified as necessary for the conservation of fish.

16. In devising and adopting the rules and regulations governing the taking of food fish for commercial purposes, the defendant has failed to give proper recognition or make adequate provision for the exercise of treaty fishing rights of Indians at their usual and accustomed places and has adopted regulations which discriminate against the taking of fish at the usual and accustomed places of the previously mentioned Indian Tribes in favor of those who take fish at other locations. In doing so the defendant is unlawfully discriminating against the exercise of Indian treaty fishing rights in the recognition and beneficial use of such treaty rights. Such discrimination results in irreparable damage to such Tribes and their members.

WHEREFORE, plaintiff prays that the Court:

1. ORDER, ADJUDGE, and DECREE that

(a) Each of the tribes named in this complaint owns and it may authorize its members to exercise a right derived from the laws and treaties of the United States to take fish at its usual and accustomed places, which right is distinct from any right or privilege of individuals to take fish derived from common law or state authority, and the exercise of which is subject to state control only through such statutes or regulations as have been established to be necessary for the conservation of the fishery and which do not discriminate against the exercise of such right;

(b) Before defendant may regulate the taking and disposition of fish by members of said tribes at usual and accustomed fishing places pursuant to treaties between said tribes and the United States;

(i) It must establish by hearings preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with

assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

(ii) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

(iii) It must so regulate the taking of fish that, except for unforeseeable circumstances beyond its control, the treaty tribes and their members will be accorded an opportunity to attempt to take, at their usual and accustomed fishing places, by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run.

2. Declare RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, RCW 77.16.060, WAC 220.20.010, WAC 220-20-015(2) and WAC 220-47-020 null and void insofar as they deny or restrict the right of members of the Tribes named in this complaint, acting under tribal authorization, to take fish for subsistence and commercial purposes at their tribe's usual and accustomed fishing places or to possess or dispose of fish so taken.

3. Declare that the defendant, its officers, agents, and employees may not apply the provisions of RCW 75.08.260, RCW 77.12.100, 77.16.020, and 77.16.030 in such manner as to prevent or restrict members of the tribes named in paragraph 2 hereof from taking fish for subsistence and commercial purposes at their tribe's usual and accustomed fishing places or to possess or dispose of fish so taken without previously having established that the imposition of such specific restriction is necessary for

the conservation of fish and does not discriminate against the taking of fish pursuant to such treaty right.

4. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, 77.16.060, WAC 220-20-010, WAC 220-20-015(2) and WAC 220-47-020 in such manner as to prevent or restrict members of the said tribes from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the treaties between those tribes and the United States.

5. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of state laws or regulations in such manner as to prevent or restrict members of said tribes from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the treaties between said tribes and the United States without previously having established that the imposition of state regulation is necessary for the conservation of fish and does not discriminate against the taking of fish pursuant to such treaty right.

6. Grant such further and additional relief as the plaintiff may be entitled to.

7. Award plaintiff the costs of this action.

8. Retain jurisdiction of this cause for the purpose of enforcing or supplementing the judgment of this Court.

DATED this 18th day of September, 1970, at Seattle, Washington.

/s/ STAN PITKIN
United States Attorney
Western District of Washington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NO. 9213

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF WASHINGTON

Defendant.

Permission of intervene having been granted, the Confederated Tribes and Bands of the Yakima Indian Nation complain and allege as follows:

FIRST CLAIM FOR RELIEF

1. This Court has jurisdiction by reason of the fact that the United States is plaintiff. 28 U.S.C. 1345.

2. This Court has jurisdiction by reason of the existence of a federal question. This case involves, the interpretation of plaintiff's rights under a treaty with plaintiff and the United States (Treaty with the Yakimas 12 Stat 951) 28 U.S.C. 1331.

WHEREFORE, Plaintiff prays that the court:

1. ORDER, ADJUDGE, AND DECREE that

(a) The Yakima Tribe owns and it may authorize its members to exercise a right derived from the laws and treaties of the United States to take fish at

its usual and accustomed places, which right is distinct from any right or privilege of individuals to take fish derived from common law or state authority, and the exercise of which is subject to state control only through such statutes or regulations as have been established to be necessary for the conservation of the fishery and which do not discriminate against the exercise of such right;

(b) Before defendant may regulate the taking and disposition of fish by members of the Yakima Tribe at usual and accustomed fishing places pursuant to treaties between said tribes and the United States:

(i) It must establish by hearings preliminry to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

(ii) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

(iii) It must so regulate the taking of fish that, except for unforeseeable circumstances beyond its control, the treaty tribes and their members will be accorded an opportunity to attempt to take, at their usual and accustomed fishing places by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run.

2. Declare RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, RCW 77.16.060, WAC 220-20-010, WAC 220-20-015(2) and WAC 220-47-020 null and void insofar as they deny or restrict the right of members of the Yakima Tribe, acting under tribal authorization, to take fish for subsistence and commercial purposes at their tribe's usual and accustomed fishing places or to possess or dispose of fish so taken.

3. Declare that the defendant, its officers, agents, and employees may not apply the provisions of RCW 75.08.260, RCW 77.12.100, RCW 77.16.020, and 77.16.030 in such manner as to prevent or restrict members of the tribes named in paragraph 2 hereof from taking fish for subsistence and commercial purposes at their tribe's usual and accustomed fishing places or to possess or dispose of fish so taken without previously having established that the imposition of such specific restriction is necessary for the conservation of fish and does not discriminate against the taking of fish pursuant to such treaty rights.

4. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, RCW 77.16.060 WAC 220-20-010, WAC 220-20-010, WAC 220-20-015(2) and WAC 220-47-020 in such manner as to prevent or restrict members of the said tribes from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the treaties between those tribes and United States.

5. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of state laws or regulations in such manner as to prevent or restrict members of the Yakima Tribe from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the treaties between Yakima Tribe and the United States without previously having established that the imposition of state regulation is necessary for the conservation of fish and does not discriminate against the taking of fish pursuant to such treaty right.

6. Grant such further and additional relief as the plaintiff may be entitled to.

7. Award plaintiff the costs of this action.

8. Retain jurisdiction of this cause for the purpose of enforcing or supplementing the judgment of this Court.

DATED this 16th day of July, 1971, at Yakima, Washington.

/s/ JAMES B. HOVIS
Yakima Tribal Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NO. 9213

UNITED STATES OF AMERICA,

Plaintiff,

HOH TRIBE OF INDIANS,

Plaintiff-Intervenors,

vs.

STATE OF WASHINGTON,

Defendant.

COMES NOW the Hoh Tribe of Indians as Plaintiff-Intervenors and alleges as follows:

JURISDICTION

1. This Court has jurisdiction of this action by virtue of 28 U.S.C., Sections 1331, 1337, 1343(3), 1343(4) and 1362. This action is for declaratory relief in a civil action pursuant to 28 U.S.C., Sections 2201 and 2202, and for injunctive relief with respect to the enforcement of certain statutes, regulations, orders, practices, and policies of the State of Washington and its officers and agents, including Thor C. Tollefson, Director of the Department of Fisheries, and Carl Crouse, Director of the Department of Game, and the members of the State of Washington Game Commission, restrict prohibiting and otherwise qualifying the rights of plaintiff Hoh Indian Tribe to take fish within Indian country and at their usual and accustomed places off their reservation. This action is brought under the Constitution, laws and treaties of the United States., including the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution; the Supremacy Clause, Article VI, Clause 2, of the Constitution; Amendments I and IV to the Constitution, and the Due Process and Equal Protec-

tion Clauses of Amendment XIV to the constitution; 18 U.S.C. Sections 1151 through 1153; 42 U.S.C. Section 1983; Public Law 280 (Act of August 15, 1953, 67 Stat., 588 et seq., as amended); The Treaty of Olympia, July 1, 1855, and January 25, 1856.

This action seeks to redress the deprivation under color of the laws, statutes, ordinances, regulations, customs and usages of the State of Washington relating to fishing including, but not limited to, Revised Code of Washington (RCW), Chapters 75 and 77 and Washington Administrative Code (WAC), Chapter 220 and the orders, regulations, and policies promulgated pursuant to them of rights, privileges, and immunities secured to plaintiff, Hoh Indian Tribe, by the United States Constitution.

* * * *

WHEREFORE, Plaintiff prays that this Court:

1. ORDER, ADJUDGE and DECREE that

(a) The Hoh Tribe owns and it may authorize its members to exercise a right derived from the laws of the United States and the Treaty of Olympia to take fish at its usual and accustomed places, which right is distinct from any right or privilege of individuals to take fish derived from common law or state authority.

(b) The matter of Indian treaty fishing must be dealt with as a subject separate and distinct from fishing by others. As one method of accomplishing conservation objectives, it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

2. Declare RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, 77.16.060, WAC 220-20-010, WAC 220-20-015(2) and WAC 220-47-020 null and void insofar as they deny or restrict the right of members of the Hoh Tribe, acting under tribal authori-

zation, to take fish for subsistence or commercial purposes at the tribe's usual and accustomed fishing places, or to possess and dispose of fish so taken.

3. Enjoin the defendant, its officers, agents and employees from enforcing the provisions of RCW 75.12.060, RCW 75.12.070, RCW 77.08.020, RCW 77.12.130, RCW 77.16.040, RCW 77.16.060, WAC 220-20-010, WAC 220-20-015(2) and WAC 220-47-020 in such manner as to prevent or restrict members of the hoh Tribe from taking fish at their usual and accustomed places in accordance with tribal authorization pursuant to the Treaty of Olympia.

4. Grant such further and additional relief as the Hoh Tribe may be entitled to.

5. Award the Hoh Tribe its costs and disbursements herein.

6. Retain jurisdiction of this cause for the purpose of establishing any necessary rules or regulations and for enforcing or supplementing the judgment of this Court.

DATED this 20th day of January, 1971, at Hoquiam, Washington.

/by/ LESTER STRITMATTER
Attorneys for Plaintiff-Intervenor
Hoh Tribe of Indians

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

NO. 9213

UNITED STATES OF AMERICA

Plaintiff,

QUILEUTE INDIAN TRIBE

Intervenor,

v.

STATE OF WASHINGTON; THOR C. TOLLEFSON, individually and as director fo the State of Washington Department of Fisheries, CARL N. CROUSE, individually and as director of the State of Washington Department of Game; and WASHINGTON STATE GAME COMMISSION,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

Permission to intervene having been granted, the Quileute Indian Tribe by and through its attorneys, Ziontz, Pirtle & Morisset, complains and alleges as follows:

FIRST CLAIM FOR RELIEF

1. This court has jurisdiction for the reason that this action is brought by the Quileute Indian Tribe of the Quileute Indian Reservation, a federally-chartered Indian Tribe with a governing body recognized by the Secretary of the Interior and the Bureau of Indian Affairs, concerning matters arising under a treaty of the United States. 28 U.S.C. § 1362.

* * * *

WHEREFORE, intervenor prays that the court order, adjudge and decree that:

1. The Quileute Indian Tribe owns, and it may authorize its members to exercise, a right derived from the laws and treaties of the United States to take fish at all usual and accustomed places, which right is distinct from any right or privilege of non-Indians and non-members of the Quileute Indian Tribe; that such right is distinct from any right or privilege of non-members of the Tribe to take fish which may be derived from common law, State authority or any other source.

2. The defendant may not interfere with the Quileute Indian Tribe's exercise of its fishing rights derived from treaty unless such interference is necessary to insure the maintenance of the species of fish in the specific waters where such a Quileute fishery is conducted, and where such preservation cannot be achieved by strict regulation or prohibition of fishing by non-Indians and where such prevention will not be achieved by Tribal regulation.

3. All of the following provisions of the Washington State Fisheries and Game Code and regulations promulgated thereunder are inapplicable and null and void as to members of the Quileute Indian Tribe when fishing in usual and accustomed fishing places of the Quileute Indian Tribe:

RCW 77.12.080: (arrest without warrant for violation of law, rule or regulation pertaining to game)

RCW 77.12.090: (search of vehicles for game fish without warrant)

RCW 77.12.100: (seizure and forfeiture of game fish and gear)

RCW 77.12.120: (seizure and contraband game)

RCW 77.12.130: (authorizing seizure and abatement of nets for game fish)

RCW 77.16.030: (unlawful to have possession of game fish during closed season)

RCW 77.16.040: (unlawful to sell game fish)

RCW 77.16.060: (unlawful to use nets to take game fish)

RCW 77.15.240: (general penalty—misdemeanor—90 days)

RCW 75.08.160: (right of entry on any lands or waters—no trespass)

RCW 75.08.170: (right to search without warrant)

RCW 75.08.180: (search warrants)

RCW 75.08.190: (arrest without warrant)

RCW 75.08.210: (duty to make requiried reports)

RCW 75.08.260: (gross misdemeanor to violate fisheries code)

RCW 75.12.060: (outlawing nets and weirs)

RCW 75.12.070: (prohibiting taking of fish by gaff hook)

RCW 75.12.230: (outlawing transportation of salmon caught in prohibited waters or by prohibited gear)

RCW 75.12.280: (outlawing monofilament gill nets)

RCW 75.16: (outlawing taking of fish for propagation or scientific purposes)

RCW 75.36.010: (authorizing seizure without warrant of fish, gear and boats)

RCW 75.36.020: (forfeiture of seized articles)

WAC 220-20-010, (1) - (16): (requiring all fishing practices to be in conformity to state regulation and prohibiting certain fishing techniques and practices)

WAC 220-20-015, (1) - (9): (setting requirements for fishing for salmon)

WAC 220-20-020, (1) - (6): (prohibiting certain fishing practices with respect to food fish other than salmon)

WAC 220-20-025: (prohibiting certain pratices with respect to clams, crabs and shellfish)

WAC 220-20-030: (purporting to specifically restrict Indian fishing)

WAC 220-28-010: (establishing emergency closed periods)

WAC 220-47-020, (4), (12): (establishing a salmon preserve and prohibiting commercial fishing at such preserves in places which are the usual and accustomed fishing grounds of intervenor)

WAC 220-47-030: (prohibiting use of certain gear for catching of salmon on Puget Sound)

WAC 220-47-040: (establishing reasons and dates for use of purse seine fishing techniques for salmon in Puget Sound)

WAC 220-47-060: (establishing closures for gillnet salmon fishing in Puget Sound)

WAC 220-48-070: (establishing bottom fishing areas)

WAC 220-48-080: (establishing limitations on gear use for bottom fishing)

WAC 220-48-090: (establishing certain closed waters for bottom fishing)

WAC 220-48-100: (establishing seasons for bottom fishing with gear other than otter trawl)

WAC 220-48-120: (establishing restrictions on use of gear for herring and candlefish fishing)

WAC 220-48-130: (prohibiting herring or candlefish fishing except with gear authorized by regulation)

WAC 220-48-140: (establishing seasons for herring and candlefish)

WAC 220-48-150: (establishing restrictions on perch fishing)

WAC 220-48-170, 180, 190, 200: (establishing restrictions on anchovy and pilchard fishing)

WAC 220-48-210, 220, 230, 240: (establishing restrictions on smelt fishing)

WAC 220-56-020: (establishing restrictions on fishing for personal use)

WAC 220-56-023: (prohibiting salmon fishing for personal use without possession of a required card)

WAC 220-56-030: (establishing possession limits for food fish)

WAC 220-56-050: (establishing general regulations for handling of food fish)

Further, that the defendant be forever restrained from enforcing its criminal penalties against members of the Quileute Indian Tribe, including fines, jail, seizure, confiscation and forfeiture of gear, vessels and fish, when the tribe or its members are fishing at usual and accustomed grounds and stations.

4. Defendant be confined to civil remedies in any case where it seeks to interfere with the tribe's fishing rights and in any such case, the burden should be upon the defendants to show that any interference proposed by it is the least restrictive consistent with the necessary escapement for preservation of the species.

5. Intervenor tribe has exclusive jurisdiction to permit and regulate fishing by all persons within the boundaries of its reservation.

6. Defendants have a duty to regulate fishing which is under their jurisdiction so as to prevent interference with it by others who are not members of the Quileute Indian Tribe.

7. The right of the Quileute Indian Tribe to promulgate and enforce its own Tribal fishing regulations which should be applicable to its members with respect to exercise of their treaty rights is affirmed.

DATED this 3rd day of May, 1971.

/s/ ALVIN J. ZIONTZ
Attorneys for Intervenor
3101 Seattle-First National Bank Bldg
Seattle, Washington 98104
Telephone: MAin 3-1255

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

NO. 9213

UNITED STATES OF AMERICA,

Plaintiff,

UPPER SKAGIT RIVER TRIBE,

Plaintiff Intervenor,

v.

STATE OF WASHINGTON, THOR C. TOLLEFSON, individually, and as Director of the State of Washington Deparment of Fisheries; CARL CROUSE, individually, and as Director of the State of Washington Department of Game; JAMES AGEN, CLAUDE BEKINS, ARTHUS S. COFFIN, EDSON DOW, ELMER G. GERKEN, and HAROLD PEBBLES, individually and as members of the State of Washington Game Commission,

Defendants.

Plaintiff-Intervenors allege:

JURISDICTION

1. This court has jurisdiction of this action under 28 USC 1331, 1337, 1343(3), 1343(4), and 1362. his is a civil action for declaratory relief, pursuant to 28 USC 2201 and 2202, and injunctive relief with respect to the enforcement of certain statutes, regulations, orders, practices, and policies of the State of Washington and its officers and agents, including Thor C. Tollefson, Director of the Department of Fisheries, and Carl Crouse, Director of the Department of Game, and the members of the State of Washington Game Commission, restricting, prohibiting, and otherwise qualifying the rights of Plaintiffs and the members of Plaintiff tribes to take fish wihin Indian country and at their usual and accustomed places off their reservations. It

is brought under the Constitution, laws, and treaties of the United States including the Commerce Clause, Article I. Section 8, Clause 3, of the Constitution; the Supremacy Clause, Article VI, Clause 2, of the Constitution; Amendments I and IV to the Constitution; and the Due Process and Equal Protection Clauses of Amendment XIV to the Constitution; 18 USC 1151 through 1153; 42 USC 1983; Public Law 280 (Act of Aug. 15, 1953, 67 Stat. 588 et. seq., as amended); the Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; as related to Plaintiff-Intervenors, Upper Skagit River Tribe this action seeks to have a decision made as to the interpretation of the said Treaty of Point Elliott as relating to the Plaintiff Intervenor and to the authority of the State of Washington through their respective agencies and employees to regulate fishing and how such regulations, orders or policies as set forth or promulgated by the State of Washington agencies or employees would affect the rights, privileges and immunities secured to the Plaintiff-Intervenors by the United States Constitution or by the Treaty as above set forth.

Plaintiff-Intervenors contend that any state statutes and regulations initiated or executed by the State of Washinton is unconstitutional as applied to the Plaintiff-Intervenors.

* * * *

WHEREFORE, Plaintiffs pray that this Court:

1. Assume jurisdiction of this case determine that this matter may be heard as a class action.

2. Declare that:

a. Plaintiff tribes are entitled to sufficient fish from the waters within and adjoining their reservations and passing by their usual and accustomed fishing stations in order for such tribes and their members to derive their subsistence, sustain their livelihood and continue their way of life, culture, and religion now and in the future;

b. Plaintiffs have a right to fish free from the prohibitions, restrictions, and regulations of the State of Washington upon Plaintiffs' reservations which reservations include all lands reserved by such tribes in treaties executed by them and the United States even though such lands subsequently may have been patented or rights of way granted across them, whether or not Indian title to such lands has been extinguished, and including Indian allotments held in trust outside the boundaries of reservations which were obtained in exchange for reservations land and to which the Indian title has not yet been extinguished.

c. Plaintiffs have a right to fish at usual and accustomed grounds and stations outside their reservations as reserved in their treaties with the United States, subject to no qualification or limitation by the State of Washington except in the extreme circumstances when the regulation is shown by the state to the satisfaction of a court of competent jurisdiction to be necessary for conservation of fish which conservation cannot be achieved by restriction, regulation, or prohibition of fishing by non-Indians and will not be achieved by tribal regulation;

d. Defendants have a duty to exercise the police power of the State of Washington, to regulate fishing by non-Indians, which is under their jurisdiction, and to institute programs of conservation and propagation, so as to insure that Plaintiffs' treaty rights are protected and that there is available to Plaintiffs sufficient fish for subsistence, the maintainance of a livelihood, and the exercise of their traditional culture and religion;

e. Defendants' continued trespasses, seizures, harassment, intimidation, threats, and other interferences with the lawful exercise by Plaintiffs of their rights under their treaties with the United States violates Plaintiffs' civil rights.

3. Enjoin Defendants, their officers and agents, and all persons in concert or participation with them, from:

a. Enforcing or attempting to enforce any state statute regulation, or order purporting to prohibit, regulate, restrict, authorize, or license fishing by any person in waters adjacent to or passing through lands within the boundaries of Plaintiffs' reservations as reserved in the treaties entered into by Plaintiffs' tribes with the United States even though such lands subsequently may have been patented or rights of way granted across them, whether or not Indian titles to such lands has been extinguished, or allotments or lands outside such reservations which were exchange for allotments within the reservation condemned or otherwise taken, the Indian title to which allotments or lands has not been extinguished, except when such endorsement is pursuant to a request by or agreement with a tribe having jurisdiction over the land in question or individual Indians holding allotments or other lands outside the reservation;

b. Attempting to apply or enforce any statute, regulation or order which is declared by this court to be contrary to the treaties between the tribes and the United States or their purposes, or violative of any provision of the United States Constitution;

c. Considering, developing, drafting, enacting, or promulgating statutes, regulations, or orders intended to regulate fishing by non-Indians under Defendants' jurisdiction without including members of Plaintiffs' Tribes upon decision making bodies and boards.

4. Retain jurisdiction of this case to enforce compliance with the orders of this court;

5. Award Plaintiffs their costs in this action;

6. Grant such other relief as may be proper.

DATED this 1st day of October, 1971.

/s/ WILLIAM A. STILES, JR.

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents,

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

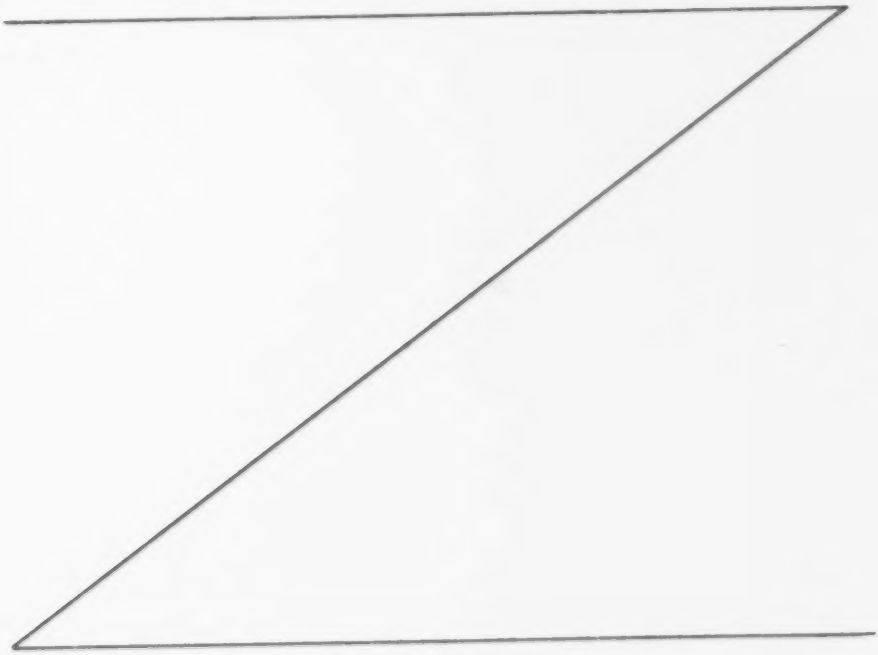
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT INDIAN TRIBES

(Excerpts)

In contrast, the only issue now before the Court is the extent of the tribes' reserved property rights. Clearly, it is

not inconsistent with the status of Indian tribes, or with non-treaty constitutional liberties[310] that they should possess the treaty fishing rights declared by the District Court. Indeed, many of the cases discussing the canons of con struction deal with questions of Indian tribal property rights. *See e.g., United States v. Winters*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Tulee v. Washington*, 315 U.S. 681 (1942); *Antoine v. Washington*, 420 U.S. 194 (1975); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Choate v. Trapp*, 224 U.S. 665 (1912). Not only is there no tension between this reservation of rights and their status as tribes, but it appears from the evidence that this is the primary consideration upon which the tribes insisted in exchange for ceding their vast holdings.



310. The equal protection argument raised by the State and Associations is without merit. See Part VII, *infra*.

As Washington points out, if the Court concludes that the treaties reserve to the tribes rights which are separate and distinct from those of non-treaty citizens, "such a conclusion would remove the impediment . . . to the exercise of necessary regulatory power by the Department of Fisheries." State Br. at 99. Thus, there will be no continuing need for injunctions like the ones at issue. The District Court's injunctions of September 27, 1977 and June 6. 1978, have become necessary only because of the unfortunate hiatus in State enforcement power.

The Court of Appeals upheld the September 27 injunction concluding,

> The fishers' interest is . . . derivative of the State's interest; the fishers are in privity with the state and are bound by actions affecting its sovereign interests to which it is a party.

573 F.2d at 1132. If this Court reaches the argument, it must agree that the court was correct. The State has vigorously litigated this case, not as a reluctant representative, but in its sovereign capacity on behalf of citizens, and as the consistent representative of its licensees, the non-treaty fishermen. In addition, the District Court's orders can be sustained by the All Writs Act, 28 U.S.C. §1651, for they are necessary to protect and effectuate the court's judgments.

1. The State has fully litigated the extent of its sovereign interest in the fishery, and this binds its fishermen.

The United States and the Indian tribes have prosecuted this action against the State of Washington to vindicate their treaty rights and prevent state-authorized preemp-

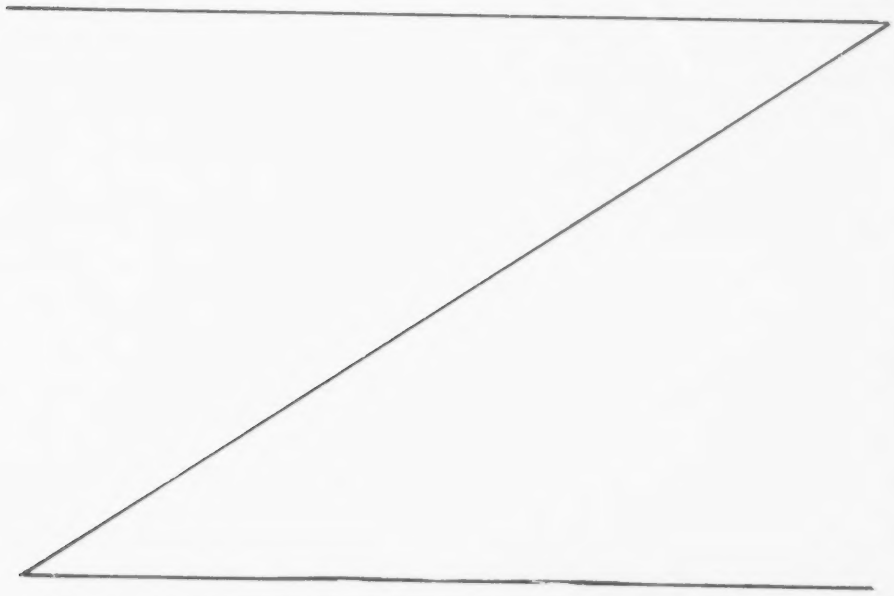
tion of those rights by the non-treaty fishermen. Although the State Departments of Fisheries and Game have intervened, the State of Washington remains the principal defendant. Washington has vigorously defended its sovereign interest in regulating and preserving the fishery for exploitation by its citizens. *Cf., Baldwin v. Fish & Game Comm'n of Montana,* 436 U.S. 371 (1978) (Burger, C. J., concurring).

This Court recently confirmed the continuing vitality of *parens patriae* in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), holding that a state appropriately represents and binds its citizens in litigation where the sovereign interests of the state are implicated.[422] The Supreme Court of Washington has also recognized the *parens patriae* doctrine as it relates to Washington's sovereign interest in its fish resources. *Washington Kelpers Assoc. v. State,* 81 Wn.2d 410, 502 P.2d 1170 (1972), *Cf., State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936). Moreover, the State legislature has declared that "preservation of the salmon industry and the salmon resources of the State of Washington is vital to the State's economy." RCW 75.18.005. Washington thus acted in its governmental capacity, in

---

422. The states act as *parens patriae* in protecting their citizens' interests in clean water, *e.g., New York v. New Jersey,* 256 U.S. 296 (1921), *Missouri v. Illinois,* 180 U.S. 208 (1901); sufficient water, *e.g., Kansas v. Colorado,* 206 U.S. 46 (1907); clean air, *e.g., Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907); free trade, *e.g., Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972), *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); and preservation of fish, *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958).

defense of its sovereign interests, in this litigation.[423] Clearly when Washington protects its interest in the fishery it also represents the interests of its citizens in the fishery. Under these circumstances, when a State is a party as *parens patriae,* any judgment rendered against the State binds all citizens of the state. *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *New Jersey v. New York,* 345 U.S. 369 (1953); *Wyoming v. Colorado,* 286 U.S. 494 (1932).[424]

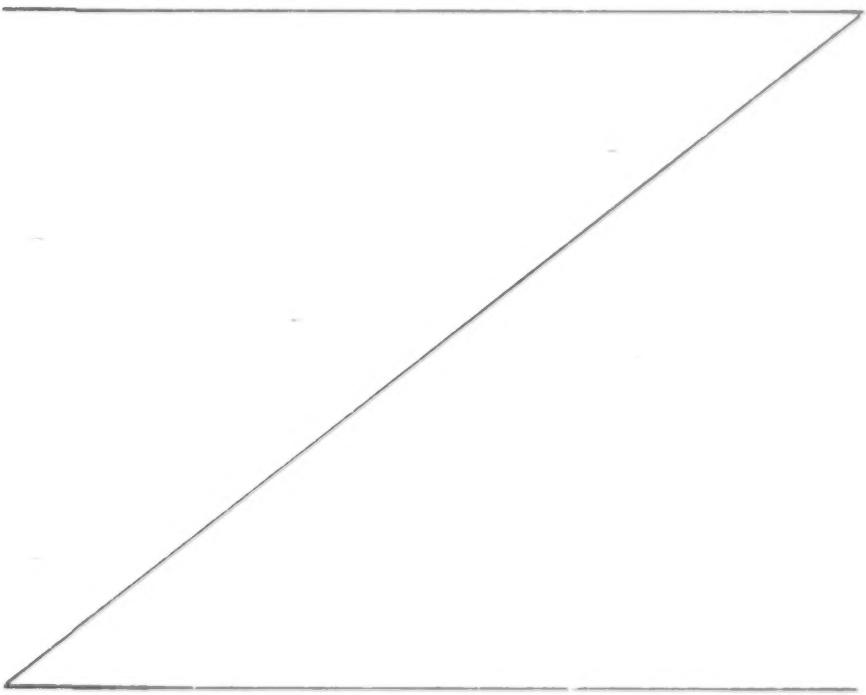


423. Members of this Court have expressed in several ways the relation of the State to fish resources within its boundaries. Whether the State's interest in the right to harvest fish and in the fish themselves is described as "common ownership," *Geer v. Connecticut,* 161 U.S. 519, 529 (1896), or as a "power to preserve and regulate the exploitation of an important resource," *Douglas v. Seacoast Products,* 431 U.S. 265, 284 (1977), it is clear that the State's sovereign interests are implicated.

424. The *parens patriae* role is particularly appropriate in the instant case where the litigation focused on the portion of the harvestable fish resource which may be made available to state citizens collectively. In defending this litigation, Washington did not act on behalf of any single citizen group. Rather, the State defended its sovereign interests in the fishery and attempted to maximize the portion of the resource available for exploitation by its citizens.

2. The District Court acted properly, pursuant to the All Writs Act, in enjoining non-parties from interfering with its judgment.

The State and its non-treaty licensees have consistently resisted the decrees, orders and injunctions entered by the District Court, *see* 573 F.2d 1123, 1126 (9th Cir. 1978), App. A-2-3, Petition in No. 78-119, and *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978), *cert. pending*. This section will discuss the breadth of the District Court's power to protect the federal rights which it has enunciated, the similarity of this and numerous school desegregation cases, and an alternate legal theory under which the District Court may protect the peaceful enjoyment of property partitioned by the court.



Finally, the District Court acted *in rem* in partitioning the right to take fish, and it retains jurisdiction over the *res* to the extent necessary to prevent interference with the partition. *United States v. Washington* is an *in rem* action to divide the property right in the taking of fish. 520 F.2d at 687-88, Joint App. 50; 573 F.2d at 1126, 1128, App. A-2, 4, 7, Petition in No. 78-119. The label *"in rem"* properly applies to a wide variety of actions where the court, in order to give effect to its jurisdiction, must control the property. *See* 1A Pt. 2 *Moore's Federal Practice*, ¶0.214 (1978).